

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A VARIANCE PERMIT
GRANTED TO WALTER A. SCHALL BY
MASON COUNTY AND DENIED BY THE
DEPARTMENT OF ECOLOGY

WALTER A. SCHALL and MASON COUNTY,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

SHB No. 78-26

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from the partial disapproval of a variance permit, came before the Shorelines Hearings Board, Dave J. Mooney, Chairman, Chris Smith, Rodney G. Proctor, Robert E. Beaty, and David A. Akana (presiding), in Lacey, Washington, on October 27, 1978.

Appellants were represented by their attorney, Brian E. Lawler; respondent was represented by Robert E. Mack, Assistant Attorney General. Mason County did not appear.

1 Having heard the testimony, having examined the exhibits, and
2 having considered the contentions of the parties, the Shorelines
3 Hearings Board makes these

4 FINDINGS OF FACT

5 I

6 Appellants own a recreational residence located about four miles
7 east of Union, Washington, on property described as Lot 15 of the
8 Brook Point Estates plat. The residence, built around 1953, is on and
9 over the waters of Hood Canal, a shoreline of state-wide significance.
10 Highway 106 on the uplands runs adjacent to all 21 lots of the plat.
11 Most of appellants' residence is constructed on piling as opposed to
12 landfill which is commonly found elsewhere in the plat.

13 II

14 On March 9, 1978, appellants made application for a variance permit
15 to construct two decks for their existing residence. One deck is an
16 8-foot by 24-foot cantilevered deck located waterward (north) of the
17 home, beyond the ordinary high water mark (OHWM), over water. Appellants
18 state that they would be satisfied with a 6-foot by 24-foot deck, however.
19 The second deck, similarly constructed, is to be located on the east side
20 of the home, also over water. There is an existing 6-foot by 20-foot
21 covered deck, which fronts the north portion of the house.

22 III

23 On June 12, 1978 Mason County approved appellants' application for
24 a variance permit, which was thereafter forwarded to respondent. On
25 July 12, 1978, acting pursuant to its authority, respondent disapproved
26 the proposed variance permit as to the 8-foot by 24-foot deck and

27 FINAL FINDINGS OF FACT,
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1 approved it as to the 3-foot by 20-foot deck. The disapproval was based
2 upon a determination that the 8-foot by 24-foot deck would encroach
3 beyond the common line of other existing decks built on nearby
4 residences, and a finding that such deck was "inconsistent with the
5 [Mason County Shoreline] Master Program [hereinafter "SMP"] and criteria"
6 for a variance. The respondent's disapproval was appealed to this Board.

7 IV

8 Appellants want the larger deck so that they may have exposure to
9 the sun without incurring substantial remodeling costs to their existing
10 residence. Appellants' lot is such that any residential construction
11 over water extending beyond the existing building envelope would
12 necessitate a variance from the setback requirements of the SMP. However,
13 appellants are able to use the home, as constructed, as a residence.

14 V

15 Many homes in the plat, some over water, have decks, piers, pilings,
16 bulkheads and fills waterward of the pre-development shoreline.
17 Appellants' proposal would allow a deck which would extend further over
18 water than the deck on a residence located on the lot immediately east
19 of appellants.

20 VI

21 The proposed substantial development will have no significant
22 adverse impact on the environment. If the appellants' deck is permitted,
23 interference with public rights of navigation would be inconsequential.

24 The proposed substantial development will not reduce the view from
25 neighboring structures.

VII

The line of structures throughout the 21 lots of the plat is commonly a distance of 55 feet from the road's edge, although some structures located thereon may be closer or farther. Appellants' residence extends no further waterward than 55 feet. Lot 14, lying southwest of appellants' lot, is vacant, but has a bulkhead beginning at the 55-foot line with the toe of the bulkhead extending eight to ten feet waterward. A bulkhead extends in a straight line 55 feet from the road at the northeast corner of Lot 14 to 71 feet from the road at the northwest corner of Lot 11. Lot 12 has a residence with a deck extending eight feet beyond the 55-foot line. To the northeast of appellants' property, over Lots 16 through 21, the line is also about 55 feet from the road. The residence on Lot 19 includes a deck which extends 20 feet beyond the 55-foot line; Lots 20 and 21 have residences with decks extending 3 feet 7 inches beyond the 55-foot line.

We find the "common line", which is not otherwise defined anywhere, to include all man-made intrusions into the water, excluding docks and groins. Such a line should apply equally over those lots that share a common orientation and view. For the instant plat, this line includes the east half, or Lots 11 through 21. The average length of intrusion over the 55-foot line is about 8 feet 9 inches. The "common line" for Lots 11 through 21, including appellants' lot, is therefore 63 feet 9 inches from the road.

VIII

The SMP places the site in an urban residential environment.

Section 16.08.A.2 for residences in such environments provides

1 for a building setback of 15 feet from the line of ordinary high
2 water and further provides that structures are not to extend beyond
3 the "common line" of neighboring structures. See also Section 20.010.C.
4 Appellants seek a variance from the 15-foot setback provision.

5 Section 28.020 provides that a variance will be granted only after
6 the applicant can demonstrate the following:

- 7 A. The hardship which serves as a basis for the granting of
8 a variance is specifically related to the property of the
9 applicant.
10 B. The hardship results from the application of the require-
11 ments of the Shoreline Management Act and this ordinance
12 and not from, for example, deed restrictions or the
13 applicant's own actions.
14 C. The variance granted will be in harmony with the general
15 purpose and intent of this ordinance.
16 D. Public welfare and interest will be preserved; if more
17 harm will be done to the area by granting the variance
18 than would be done to the applicant by denying it, the
19 variance will be denied.

20 IX

21 Any Conclusion of Law which should be deemed a Finding of Fact
22 is hereby adopted as such.

23 From these Findings the Board comes to these

24 CONCLUSIONS OF LAW

25 I

26 Under the rule in effect at the time this matter was before the
27 Department (WAC 173-14-150, filed July 27, 1976, hereinafter "old
28 rule"), appellants must show, before any variance can be approved, that
29 without a variance they cannot make any reasonable use of their
30 property. If they cannot do so, the variance must fail. If they can

1 do so, they must also prove that the variance meets the requirements
2 of WAC 173-14-150(2), 173-14-150(3) and 173-14-150(4) of the old rule.

3 II

4 Appellants have failed to prove that if they comply with the
5 provisions of the SMP, they cannot make any reasonable use of their
6 property. Appellants presently have a reasonable use of the building
7 as a summer, vacation, and weekend residence. Therefore, the action of
8 the Department of Ecology in disapproving the variance must be affirmed
9 under the old rule.

10 III

11 Appellants' hardship results from the application of the Act and
12 the 15-foot setback provision of the master program.

13 IV

14 The variance, if granted, will be in harmony with the general purpose
15 and intent of the master program.

16 V

17 The public welfare and interest will not be harmed if the variance
18 is granted.

19 VI

20 The "new rule", WAC 173-14-150 (effective July 14, 1978), provides
21 that:

22 (3) Variance permits for development that will be located
23 either waterward of the ordinary high water mark (OHWM), as
24 defined in RCW 90.58.030(2)(b), or within marshes, bogs, or
25 swamps as designated by the department pursuant to chapter
26 173-22 WAC, may be authorized provided the applicant can
27 demonstrate all of the following:

(a) That the strict application of the bulk, dimensional
or performance standards set forth in the applicable master
program precludes a reasonable permitted use of the property.

1 (b) That the hardship described in WAC 173-14-150(3) (a)
2 above is specifically related to the property, and is the
3 result of unique conditions such as irregular lot shape,
4 size, or natural features and the application of the master
5 program, and not, for example, from deed restrictions or the
6 applicant's own actions.

7 (c) That the design of the project will be compatible
8 with other permitted activities in the area and will not cause
9 adverse effects to adjacent properties or the shoreline
10 environment designation.

11 (d) That the requested variance will not constitute a
12 grant of special privilege not enjoyed by the other properties
13 in the area, and will be the minimum necessary to afford
14 relief.

15 (e) That the public right of navigation and use of the
16 shorelines will not be adversely affected by the granting
17 of the variance.

18 (f) That the public interest will suffer no substantial
19 detrimental effects.

20 (4) In the granting of all variance permits, consideration
21 shall be given to the cumulative impact of additional requests
22 for like actions in the area. For example if variances were
23 granted to other developments in the area where similar
24 circumstances exist the total of the variances should also
25 remain consistent with the policies of RCW 90.58.020 and
26 should not produce substantial adverse effects to the
27 shoreline environment.

15 Appellants will be precluded from "a reasonable permitted use" of
16 their property if a 6-foot by 24-foot deck cannot be constructed
17 behind a "common line" of neighboring structures. The use of the site
18 is for a single family recreational residence. "A" reasonable
19 permitted use of such recreational property, and common to the area,
20 would include an open deck oriented to provide access to sun. Next, the
21 hardship upon appellants is the result of the shape, size, and natural
22 features of the lot, which is mostly under water, and the application of
23 the setback provision of the master program. Third, the deck is compatible
24 with decks common to other residences in the area, and no adverse environ-
25 mental effect will result to the adjacent properties or to the permitted
26 uses found in the urban residential shoreline environment. Fourth,

1 appellants will not be given a special privilege not enjoyed by
2 others in the area. From appellants' own statement, the minimum
3 deck size necessary is 6 feet by 24 feet. A larger deck would not
4 be necessary to afford them relief. Fifth, public rights of navigation
5 will not be adversely affected. Sixth, the public interest will not
6 suffer.

7 As for the cumulative impact of similar requests, we note that the
8 immediate area is substantially altered and almost completely developed
9 for residential uses. The seeds of damage to the natural conditions were
10 planted years ago with the platting of this shoreline. In the instant
11 case, it would not be equitable to allow some property owners with existi
12 decks to enjoy a seaward advantage. We would be ignoring the realities o
13 appellants' situation, and unduly penalize them in the use of their
14 property without forwarding any substantive public interest. A
15 practical solution is set forth in the master program which provides for
16 the construction only up to the common line of neighboring structures.
17 We should give effect to the provisions of the master program. Given
18 the hodgepodge of decks, docks, and homes over water, and no adverse
19 effect to navigation, upon the view, or upon the environment, the
20 cumulative impact from additional requests for like actions in the area
21 of the Lots 11 through 21 of the plat would not be inconsistent with
22 the policies of RCW 90.58.020.

23 VII

24 We conclude that the new regulation, WAC 173-14-150 (effective
25 July 14, 1978), should control in this case.

1 Because our review of this matter is de novo as to all issues, and
2 the parties have presented their cases as such, it would serve no
3 useful purpose to remand this matter to the County and Department of
4 Ecology to consider again what we have done: the facts will remain the
5 same. Therefore, under the new rule, we should reverse the Department
6 of Ecology and remand the matter for variance permit issuance for a
7 6-foot by 24-foot deck, which is the minimum necessary for relief to
8 appellant.

9 VIII

10 Any Finding of Fact which should be deemed a Conclusion of Law
11 is hereby adopted as such.

12 From these Conclusions the Board enters this

13 ORDER

14 The Department of Ecology's action denying a variance permit is
15 reversed and the matter is remanded for issuance of a permit consistent
16 with this Order.

17 DONE this 21st day of November, 1978.

18 SHORELINES HEARINGS BOARD

19 Dave J. Mooney
DAVE J. MOONEY, Chairman

20 Chris Smith
CHRIS SMITH, Member

21 David A. Akana
DAVID A. AKANA, Member

22 Rodney G. Proctor
RODNEY G. PROCTOR, Member

23 Robert E. Beaty
ROBERT E. BEATY, Member

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